Supreme Court, U.S.
FILED
00-415 SEP 15 2000

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SWISHER INTERNATIONAL, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the jurisdiction of the Court of International Trade to award refunds of the Harbor Maintenance Tax rests upon the "protest" provisions of 28 U.S.C. 1581(a) when this Court held in *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 365 (1998), that such jurisdiction is *not* provided by that statute but instead rests upon the "residual jurisdiction" of 28 U.S.C. 1581(i).

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 205 F.3d 1358. The opinion of the Court of International Trade (App., *infra*, 24a-33a) is reported at 27 F. Supp. 2d 234.

JURISDICTION

The judgment of the court of appeals was filed on February 28, 2000. The petition for rehearing was denied on May 22, 2000. On August 10, 2000, Chief Justice Rehnquist extended the time for filing a peti-

tion for a writ of certiorari to and including September 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 19 U.S.C. 1514 provides, in relevant part:

> (a) * * * [D]ecisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> (4) the exclusion of merchandise from entry or delivery * * *;
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
>
> (6) the refusal to pay a claim for drawback; or
>
> (7) the refusal to reliquidate an entry under section 1520(c) of this title;
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the

United States Court of International Trade in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title. * * *

* * * * *

(c)(3) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before—

(A) notice of liquidation or reliquidation, or

(B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

* * * * *

2. 19 U.S.C. 1515 provides, in relevant part:

(a) Unless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section[,] the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part. Thereafter, any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded and any drawback found due shall be paid. * * * Notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary. Such notice shall include a statement of the reasons for the denial, as well as a statement informing the protesting party of his right to file a civil action

contesting the denial of a protest under section 1514 of this title.

(b) A request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed * * * to the appropriate customs officer any time after ninety days following the filing of such protest. For purposes of section 1581 of title 28, a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing * * * shall be deemed denied on the thirtieth day following mailing of such request.

* * * * *

3. 28 U.S.C. 1581 provides, in relevant part:

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

* * * * *

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section * * * , the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes * * * ; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

* * * * *

4. 28 U.S.C. 2636 provides, in relevant part:

(a) A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade—

(1) within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act; or

(2) within one hundred and eighty days after the date of denial of a protest by operation of law under the provisions of section 515(b) of such Act.

* * * * *

(i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)-(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

STATEMENT

1. This case presents an important question regarding the jurisdiction of the Court of International Trade over actions seeking to recover payments of the Harbor Maintenance Tax, 26 U.S.C. 4461, for exported goods.[1] As much as half a billion dollars may turn on the correct disposition of the question presented in this case. Even outside the context of the Harbor Maintenance Tax, the question presented in this case has substantial recurring importance for the routine administration of the customs laws.

In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), this Court held that imposition of the Harbor Maintenance Tax on exported goods violates the Export Clause of the Constitution. In so holding, the Court addressed at length the jurisdiction of the federal courts to provide a remedy for that unconstitutional exaction. The Court first noted that Congress expressly provided that jurisdiction to entertain suits to recover such payments is *not* based upon the statutes that authorize tax refunds under the Internal Revenue Code. Instead, "Congress provided that, for administrative, enforcement, and jurisdictional purposes, the [Harbor Maintenance Tax] should be treated 'as if [it] were a customs duty.'" *Id.* at 367 (quoting 26 U.S.C. 4462(f)(1) and (2)).

The Court of International Trade has been given "exclusive jurisdiction" over specified actions involving customs duties under 28 U.S.C. 1581. In *United States Shoe Corp.*, this Court concluded that "the [Court of

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[1] The Harbor Maintenance Tax was enacted by Congress to fund harbor facilities developed and maintained by the United States. It imposes a tax of "0.125 percent of the value of the commercial cargo" to which it applies. 26 U.S.C. 4461(b).

International Trade] properly entertained jurisdiction" under this statute to provide a refund of the taxes imposed on exports under the Harbor Maintenance Tax. 523 U.S. at 365. The Court noted that the complaint in that case had "alleged exclusive original jurisdiction * * * under 28 U.S.C. § 1581(a) or, alternatively, § 1581(i)," and the Court "agree[d] with the [Court of International Trade] and the Federal Circuit that § 1581(i) is the applicable jurisdictional prescription." *Ibid.* The Court explained its jurisdictional holding in detail (*id.* at 365-366) (emphasis added):

> Section 1581(a) surely concerns customs duties. It confers exclusive original jurisdiction on the CIT in "any civil action commenced to contest the [Custom Service's] denial of a protest." A protest, as indicated in 19 U.S.C. § 1514, is an essential prerequisite when one challenges an actual Customs decision.[2] As to the HMT, however, the Federal Circuit correctly noted that protests are not pivotal, for Customs "performs no active role," it undertakes "no analysis [or adjudication]," "issues no directives," "imposes no liabilities"; instead, Customs "merely passively collects" HMT payments. 114 F.3d, at 1569.
>
> Section 1581(i) describes the CIT's residual jurisdiction over

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[2] 19 U.S.C. 1514 authorizes a protest only from "decisions of the Customs Service" concerning matters such as the value of imported merchandise, its classification, the rates of applicable duties, other charges and exactions within the jurisdiction of the Treasury, and the liquidation or reliquidation of an entry. 19 U.S.C. 1514(a).

> "any civil action commenced against the United States . . . that arises out of any law of the United States providing for—
>
> "(1) revenue from imports or tonnage;
>
> . . . . .
>
> "(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection . . ."

This dispute, as the Federal Circuit stated, "involve[s] the 'administration and enforcement' of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports." 114 F.3d, at 1571. * * * In short, as the CIT correctly concluded and the Federal Circuit correctly affirmed, "Congress [in § 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within [§] 1581(i)(1)." 907 F. Supp., at 421. Accordingly, *CIT jurisdiction over controversies regarding the administration and enforcement of the HMT accords with § 1581(i)(4).*

2. In the present case, however, respondent sought to recover Harbor Maintenance Tax payments on exported goods by invoking the jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a) instead of 28 U.S.C. 1581(i). The Court of International Trade dismissed the suit because this Court's decision in *United States Shoe Corp.* "makes clear that there is no protestable Customs decision with respect to the con-

stitutionality of HMT." App., *infra*, 29a. See note 2, *supra*.

The court noted that the different jurisdictional theories that had been raised in the alternative by the taxpayer in *United States Shoe Corp.* would yield different statutes of limitations for such actions. The statute of limitations for actions commenced in the Court of International Trade under 28 U.S.C. 1581(i) is two years from the date "the cause of action first accrues." 28 U.S.C. 2636(i). By contrast, an action under 28 U.S.C. 1581(a) to "contest the denial of a protest" may be commenced at any time within one hundred and eighty days after the notice of denial is mailed by the agency (under 19 U.S.C. 1515(a)) or the protest has been deemed to have been denied by operation of law (under 19 U.S.C. 1515(b)).[3] 28 U.S.C. 2636(a)(1) and (2). Because the present action was not commenced until approximately four years after some of the taxes had been paid, the court noted that "some of [respondent's] claims will be time[] barred unless jurisdiction is also cognizable under § 28 U.S.C. 1581(a)." App., *infra*, 26a.

The court explained, however, that respondent's jurisdictional theory had been expressly considered and expressly rejected in the *United States Shoe Corp.* case, in which respondent had "participated as an *amicus curiae* before both this court and the Court of Appeals for the Federal Circuit." App., *infra*, 26a. The courts

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[3] A protest of a customs "decision" filed in accordance with 19 U.S.C. 1514 (see note 2, *supra*) must be decided by the agency within two years of the date it is filed. 19 U.S.C. 1515(a). If a request for accelerated disposition of the protest is filed with the agency, however, the protest will be "deemed denied on the thirtieth day following mailing of such request." 19 U.S.C. 1515(b).

had unanimously concluded in that prior case that "jurisdiction over suits to recover HMT on exports [lies] under 28 U.S.C. § 1581(i), the residual jurisdiction of the court." *Id.* at 27a. The court explained that Section 1581(i) applies as "residual jurisdiction" precisely because (*ibid.*)

> none of the other sections of 28 U.S.C. § 1581 are available for relief. *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041, 108 S. Ct. 773, 98 L.Ed.2d 859 (1988) (citing cases). This means that if one had the opportunity for access to the court under 28 U.S.C. § 1581(a), * * * there is no § 1581(i) jurisdiction. *Lowa, Ltd.* v. *United States*, 5 CIT 81, 88, 561 F. Supp. 441, 446-47 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984).

The court rejected respondent's argument that the refusal of the Customs Service to grant refund claims filed by respondent in 1994, and the subsequent refusal of the agency to grant respondent's "protest" from the denial of the requested refund claims, resulted in a "decision regarding the 'amount of duties chargeable'" that comes within the jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a). App., *infra*, 29a (quoting 19 U.S.C. 1514(a)(2)). The court explained that, under the holding of this Court in *United States Shoe Corp.*, "there is no protestable Customs decision with respect to the constitutionality of HMT" and that "[i]t would be incongruous to permit conversion of 'no decision' into a protestable decision, by means of the unilateral choice of the exporter to seek a refund at any time of its choosing." *Ibid.* The court concluded that "a plaintiff cannot unilaterally grant itself a new limitations period by making a refund request whenever it so chooses" and that respondent's

jurisdictional contentions are barred by the decision of this Court in *United States* v. *United States Shoe Corp.*, 523 U.S. at 366. App., *infra*, 33a.

3. The court of appeals reversed. App., *infra*, 1a-23a. The court acknowledged that, in *United States Shoe Corp.*, the Court of International Trade and the Federal Circuit had both rejected the very jurisdictional argument raised by respondent in this case. The court noted that in that prior litigation it had concluded that Section 1581(i) was the proper basis for jurisdiction because Customs does not make a protestable "decision with respect to the constitutionality of the HMT" that would be within the jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a). App., *infra*, 12a. The court of appeals also acknowledged that this Court had held in *United States Shoe Corp.* that jurisdiction over HMT refund cases rests upon Section 1581(i) and is *not* founded upon Section 1581(a), because the Customs Service makes no protestable "decision" in simply collecting the tax on exports in the precise manner that Congress directed. *Ibid.* (citing 523 U.S. at 365).

Notwithstanding these clear holdings, the court of appeals stated that "the *implications* of the decisions in *U.S. Shoe*" are not binding in this case and do not require rejection of respondent's renewed assertion of its jurisdictional theory. App., *infra*, 11a (emphasis added). The court stated that in *United States Shoe Corp.* this Court merely held that "acceptance" of the unconstitutional tax by the Customs Service is not itself a protestable "decision" within the meaning of 19 U.S.C. 1514. App., *infra*, 14a. The court stated that the present case is different because (i) respondent applied for a refund with the Customs Service, (ii) its refund request was denied, (iii) respondent then "protested"

the denial of its refund request, and (iv) respondent thereafter sought review of the denial of its protest in the Court of International Trade. *Id.* at 15a-23a. The court concluded that the agency's initial denial of the requested refund was a protestable "decision" and that the agency's subsequent denial of that "protest" was then reviewable by the Court of International Trade under the jurisdiction provided by 28 U.S.C. 1581(a).[4] App., *infra*, 23a.

In so holding, the court of appeals acknowledged (App., *infra*, 13a) that it is well established that the "residual" jurisdiction of the Court of International Trade under 28 U.S.C. 1581(i) "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available * * * ." *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), cert. denied, 484 U.S. 1041 (1988). The court of appeals therefore did not dispute that the conclusion reached by this Court in *United States Shoe Corp.*—that actions to recover unconstitutional Harbor Maintenance Tax exactions are within the "residual" jurisdiction of Section 1581(i)—is necessarily premised on the understanding that jurisdiction under Section 1581(a) neither was nor "could have been available" to the taxpayer in that case. The court of appeals nonetheless stated that the jurisdictional holding in *United States Shoe Corp.* "was merely that, given the procedural posture of that case, section 1581(i) residual jurisdiction was the appropriate jurisdictional basis" and that

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[4] The Customs Service in fact took no action upon respondent's purported "protest." Respondent contends that its "protest" was denied by operation of law under 19 U.S.C. 1515(b) when the agency declined to act upon the protest within thirty days. App., *infra*, 25a. See note 3, *supra*.

nothing in that decision dictates that "only one possible procedure [exists] for challenging the export HMT." App., *infra*, 14a.

Finally, the court of appeals disagreed with the concern expressed by the Court of International Trade that respondent's theory would undermine the applicable statute of limitations by "allow[ing] a plaintiff to convert the 'no decision' of HMT payment acceptance into a protestable decision merely by filing a refund request." App., *infra*, 19a. The court of appeals stated (*id.* at 20a):

> While we agree with the principle * * * that courts should be cautious not to deprive one party of the repose intended by a statute of limitations by allowing another party to accrue a cause of action at will, that is not the situation in this case. Swisher did not sleep on its constitutional claims * * * . Rather, Swisher promptly filed its request for a refund in 1994, at the same time that many other exporters began to question the constitutionality of the HMT as it applied to exports.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals directly conflicts with the decision of this Court in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998). It also abandons and disrupts the settled precedents that prescribe and limit the jurisdiction of the Court of International Trade. The decision in this case thus has substantial recurring importance in the administration of the customs laws.

The Court of International Trade has exclusive jurisdiction over the customs disputes specified in 28 U.S.C. 1581. The Federal Circuit has exclusive jurisdiction

over appeals from the Court of International Trade. 28 U.S.C. 1295(a)(5). The decision in this case is thus nationwide in its effect. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal and administrative importance. See, *e.g.*, *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 383 (1999); *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is appropriate in this case.

1. Two possible routes have been proposed by the parties and considered by the courts for the recovery of customs exactions improperly imposed on exported goods. In *United States Shoe Corp.*, 523 U.S. at 365-366, this Court expressly rejected reliance upon 28 U.S.C. 1581(a) as a jurisdictional basis for such actions. That statute provides jurisdiction to the Court of International Trade to review "the denial of a protest" issued by the Customs Service under 19 U.S.C. 1515. See 28 U.S.C. 1581(a); note 2, *supra*. Under 19 U.S.C. 1515, the Customs Service may "allow or deny" any protest "filed in accordance with [19 U.S.C.] 1514." In turn, 19 U.S.C. 1514 authorizes the filing of a "protest" from "decisions of the Customs Service" concerning specified matters such as "the appraised value of merchandise," "the classification and rate and amount of duties chargeable," "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury," and "the liquidation or reliquidation of an entry." 19 U.S.C. 1514(a). As this Court emphasized in *United States Shoe Corp.*, this jurisdictional route is inapplicable to cases challenging the constitutionality of the Harbor Maintenance Tax on exported goods because a "protest" can be made under 19 U.S.C. 1514

only "when one challenges an actual Customs decision." 523 U.S. at 365. No "actual Customs decision" is involved in connection with a taxpayer's claim that the Harbor Maintenance Tax is unconstitutional because "Customs performs no active role, it undertakes no analysis [or adjudication], issues no directives, imposes no liabilities; instead, Customs merely passively collects HMT payments." *Ibid.* (internal quotation marks omitted).

Because 28 U.S.C. 1581(a) is not an available route for challenging the constitutionality of the tax on exports, this Court concluded in *United States Shoe Corp.* that the correct jurisdictional basis for such suits is 28 U.S.C. 1581(i). That statute "describes the CIT's residual jurisdiction" (523 U.S. at 365) over "any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * revenue from imports or tonnage" or the "administration and enforcement" of such laws. 28 U.S.C. 1581(i)(1)-(4). Since Congress specified in 26 U.S.C. 4462(f)(2) that the Harbor Maintenance Tax is to "be treated as a customs duty for purposes of jurisdiction" (523 U.S. at 366 (quoting 907 F. Supp. at 421)), this Court held that the "residual jurisdiction" afforded by Section 1581(i) is the correct jurisdictional basis for suits challenging the constitutionality of the HMT on exported goods. 523 U.S. at 366.[5]

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[5] In the *United States Shoe Corp.* case, respondent filed a brief as *amicus curiae* in the Federal Circuit and in the Court of International Trade, setting forth the same jurisdictional contentions that it urges here. See 114 F.3d at 1566. Those courts rejected respondent's contentions in that case. The Federal Circuit noted that the dispute as to "whether subsection (a) or subsection (i) of section 1581 applies * * * exists" solely because of the differing statutes of limitations that govern actions brought

Section 1581(i) is referred to as the "residual" jurisdiction of the Court of International Trade because that "jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is *or could have been* available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (emphasis added), cert. denied, 484 U.S. 1041 (1988). In particular, jurisdiction does not exist under Section 1581(i) when exporters "could have taken steps to qualify" under Section 1581(a) by filing a protest from a "decision" made by Customs under 19 U.S.C. 1514. 824 F.2d at 963 (citing *American Air Parcel Forwarding Co.* v. *United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983), cert. denied, 466 U.S. 937 (1984)). The legislative history of Section 1581 makes clear that "Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service." *United States* v. *Uniroyal, Inc.*, 687 F.2d 467,

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under these separate provisions. *Id.* at 1568. The court explained that Section 1581(a) does not afford jurisdiction because that statute "applies to suits commenced to contest the denial of a protest" and Customs makes no "protestable decision" in "merely passively collect[ing] payments calculated by the exporters pursuant to statutes and regulations." *Id.* at 1569. The court explained that "there was nothing for Customs to decide, because all substantive particulars regarding the imposition and amount of HMT are established by Congress." *Id.* at 1570. The court concluded that jurisdiction therefore does not exist under Section 1581(a) but instead exists under the "broad residual authority" in the "default provision" of Section 1581(i), which applies "when jurisdiction under any of the other subsections is unavailable or manifestly inadequate." *Id.* at 1570-1571.

471 (C.C.P.A. 1982).[6] It has therefore consistently been held that Section 1581(i) does not apply "where the litigant has failed to exhaust [an available] avenue of protest and denial" before the Customs Service. *American Air Parcel Forwarding Co.* v. *United States*, 718 F.2d at 1549.

It was precisely *because* a "protestable decision" by the Customs Service is *not* involved in that agency's collection of the Harbor Maintenance Tax on exported goods that this Court held that the "residual jurisdiction" of the Court of International Trade under Section 1581(i) may be invoked. *United States Shoe Corp.*, 523 U.S. at 365. If an exporter "could have taken steps" to obtain a "protestable decision" on its constitutional objections to that tax from the agency, its failure to do so would have precluded jurisdiction over such an action in the Court of International Trade under Section 1581(i).

2. a. In the present case, the court of appeals reached a jurisdictional conclusion that is precisely at odds with the decision of this Court in *United States Shoe Corp.* The court of appeals concluded in this case that suits to recover HMT payments on exported goods may be brought in the Court of International Trade under Section 1581(a), rather than under Section 1581(i). That holding directly conflicts with this Court's holding in *United States Shoe Corp.* that there is no "actual Customs decision" in the agency's administra-

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[6] In providing jurisdiction in the Court of International Trade for pre-importation review of a classification or valuation ruling without the requirement of a protest under 28 U.S.C. 1581(h), Congress "deleted from the bill the language of its predecessors which could be read as permitting such review when the transaction in question had already taken place." *United States* v. *Uniroyal, Inc.*, 687 F.2d at 471-472. See also *id.* at 471 nn. 11-13.

tion and enforcement of the HMT on exported goods. 523 U.S. at 365. Indeed, if, as the court of appeals has concluded, a protestable decision "could have been available" to the taxpayer in *United States Shoe Corp.*, and the taxpayer thus "could have taken steps" to obtain jurisdiction under Section 1581(a), then jurisdiction would *not* properly have existed in that case under Section 1581(i). See *Miller & Co.* v. *United States*, 824 F.2d at 963; pages 15-17, *supra*. The reasoning and conclusion of the court of appeals in the present case thus flatly repudiate the holding of this Court in *United States Shoe Corp.*[7]

b. The court of appeals failed to justify its disregard of the explicit holding of this Court that no "actual" and protestable "Customs decision" is made in the agency's enforcement of the HMT on exports (523 U.S. at 365).[8]

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[7] The court of appeals also misdescribed its own precedent in stating that *Miller* and related case law stand only for the proposition that a party may not "assert[] residual (subsection (i)) jurisdiction when jurisdiction under another subsection would be appropriate. In *U.S. Shoe*, another basis [for jurisdiction] was not available; here it is." App., *infra*, 13a. In fact, *Miller* and the cases that it cites stand for the markedly different proposition that the "residual jurisdiction" afforded under Section 1581(i) "may not be invoked when jurisdiction under another subsection of § 1581 is *or could have been* available." 824 F.2d at 963 (emphasis added). The conclusion that "residual jurisdiction" existed under Section 1581(i) in *United States Shoe Corp.* was thus both *actually* and *necessarily* premised on the conclusion that jurisdiction for the recovery of HMT payments was not available under Section 1581(a) because no "actual Customs decision" was involved in the agency's enforcement of the HMT on exported goods. 523 U.S. at 365.

[8] The refusal of the court of appeals to abide by the precedent of this Court in *United States Shoe Corp.* is especially surprising in view of the fact that the arguments submitted by respondent were

The court of appeals simply disagreed with that conclusion in stating that the agency makes a protestable "decision" when it declines to allow a refund of the tax. App., *infra*, 23a. The court's reasoning fails to consider the text of the statute: it is only decisions of the type described in 19 U.S.C. 1514(a) that support a "protest" that may be reviewed first by the agency (under 19 U.S.C. 1515) and thereafter by the Court of International Trade (under 28 U.S.C. 1581(a)). In declining a request for a refund of the Harbor Maintenance Tax on exports submitted only on the grounds that the tax is unconstitutional, the agency does not determine "the appraised value of merchandise," "the classification and rate and amount of duties chargeable," or make any of the other discrete determinations that support a "protest" under 19 U.S.C. 1514(a).[9]

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fully briefed and considered in that prior case. See 523 U.S. at 365-366; 114 F.3d at 1566, 1568-1570.

[9] By contrast, the agency's decision to deny a return of HMT payments that had been requested upon one of the grounds specified in 19 U.S.C. 1514(a)—such as an erroneous valuation of the merchandise to which the tax applies (19 U.S.C. 1514(a)(1))—could support a "protest," the denial of which would be within the jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a). The court of appeals failed to understand this distinction in asserting (App., *infra*, 15a-17a) that the mere fact that the agency's regulations permit the submission of refund requests for the HMT means that a refusal to grant such a request is necessarily a "decision" of an issue for which a protest is allowed under the statute. The Court of International Trade, by contrast, correctly noted that the denial of a refund request submitted solely on constitutional grounds does *not* represent a "decision" of any issue for which protest is authorized under 19 U.S.C. 1514. App., *infra*, 29a. As the Court of International Trade correctly observed, even if application of the HMT to exports could give rise to a protestable "decision" in some situations, no protestable "de-

As this Court concluded in *United States Shoe Corp.*, none of the "actual Customs decisions" described in 19 U.S.C. 1514(a) is involved in a taxpayer's demand for repayment of an unconstitutional Harbor Maintenance Tax. 523 U.S. at 365. In enforcing the Harbor Maintenance Tax on exports against the constitutional objections of taxpayers, the agency makes no "actual * * * decision," for it "performs no active role, it undertakes no analysis [or adjudication], issues no directives, imposes no liabilities." *Ibid.* (internal quotation marks omitted). The contrary holding of the court of appeals in this case simply neglects to consider the text of the applicable statute and the reasoning and holding of this Court in *United States Shoe Corp.*, 523 U.S. at 365-366. By contrast, the Court of International Trade correctly concluded in this case that the decision of this Court in *United States Shoe Corp.* "makes clear that there is no protestable Customs decision with respect to the constitutionality of HMT" on exported goods. App., *infra*, 29a. See also note 9, *supra*.

3. The decision in this case does more than simply refuse to apply a controlling precedent of this Court. It fails to accord proper respect to the limitations specified by Congress in waiving the government's sovereign immunity from suit. Cf. *United States* v. *Dalm*, 494 U.S. 596, 608 (1990). By thus undermining the statutes of limitations that govern customs cases, the decision creates confusion in the law for both taxpayers and the United States.

The reasoning applied by the court of appeals in distinguishing the decision of this Court in *United States Shoe Corp.* is that the "residual jurisdiction" of

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cision" is made by the agency in connection with a "dispute over the constitutionality of the HMT statute." *Id.* at 33a.

the Court of International Trade under 28 U.S.C. 1581(i) applies whenever, on "the procedural posture" of the case, no other jurisdictional theory would then be applicable. App., *infra*, 12a-14a. Under that rationale, a taxpayer who wishes to challenge a customs exaction could claim that he has a choice either to (i) proceed directly to the Court of International Trade, without filing any protest, and invoke the "residual jurisdiction" of that court under 28 U.S.C. 1581(i), or (ii) instead submit a claim for refund, "protest" its denial and seek review of the denial under the "protest" jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a). App., *infra*, 23a. Because the statute of limitations differs depending on whether jurisdiction in the Court of International Trade is based upon Section 1581(a) or 1581(i) (see page 5, *supra*), the decision of the court of appeals in this case would improperly "put control" of the statute of limitations "in the hands of" the taxpayer. *Id.* at 29a. The specification by Congress of two *different* statutes of limitations would thereby be rendered meaningless in this context—except as a mere target for evasion.

By refusing to adhere to the controlling precedent of this Court, the court of appeals has provided a different statute of limitations to the set of taxpayers involved in this case than was afforded to the taxpayers in *United States Shoe Corp.* This differing treatment yields an inconsistent remedy among similarly situated taxpayers. Review by this Court is needed to ensure that the same rules of law apply to similarly situated claimants, to achieve compliance with congressionally specified limitations on the waiver of the sovereign immunity of the United States, and to mandate proper compliance by the Federal Circuit with a directly controlling decision of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.[10]

Respectfully submitted.

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SEPTEMBER 2000

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[10] In light of this Court's detailed consideration of the issue presented here in its recent decision in *United States Shoe Corp.* (see pages 7-8, *supra*), the Court may wish to consider summary reversal.

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 99-1277

SWISHER INTERNATIONAL, INC.,
PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

[Filed: Feb. 28, 2000]
[Rehearing and Suggestion for
Rehearing En Banc Denied May 22, 2000]

Before: NEWMAN, MICHEL, and PLAGER, Circuit Judges.

MICHEL, Circuit Judge.

Swisher International, Inc. ("Swisher") appeals from a summary judgment for the government by the United States Court of International Trade, dismissing some of its claims for a refund of the unconstitutional Harbor Maintenance Tax ("HMT") as time barred. *See Swisher Int'l, Inc. v. United States*, 27 F. Supp.2d 234 (Ct. Int'l Trade 1998). The court held that 28 U.S.C. § 1581(i) (1994), not 28 U.S.C. §1581(a), is the proper basis of

jurisdiction for this constitutional challenge to the application of the HMT to exports. The court ruled that a Customs Service decision to deny a refund request based on such a challenge was not a decision subject to protest under 19 U.S.C. § 1514(a) and thus cannot support Court of International Trade jurisdiction under 28 U.S.C. § 1581(a). Since under the HMT regulation there is no time limit for filing a request for refund of the HMT,[1] if its denial were protestable, the refund claims in the complaint would not have been dismissable, given that Swisher had timely filed its protest and the subsequent Court of International Trade suit when the protest was denied. The court thus held that 28 U.S.C. § 1581(i), affording the Court of International Trade residual jurisdiction, was the exclusive jurisdictional basis for this suit. Because it held that jurisdiction arose under section 1581(i), the court entered judgment for the United States on all of Swisher's claims that were barred by the two-year statute of limitations applicable to that subsection.[2] The court entered judgment for Swisher on the claims related to

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[1] 26 U.S.C. §§ 4461, 4462, the statute authorizing the HMT, contains no discussion of refunds. The governing regulation merely specifies that a refund shall be requested by mailing Customs Form 350 to a designated address; no time period for filing a refund request is discussed. *See* 19 C.F.R. § 24.24(e)(5) (1998).

[2] The applicable statute of limitations is 28 U.S.C. § 2636(i) (1994) which provides:

> . . . (i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)—(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

HMT paid within the two-year statute of limitations. Swisher timely appealed to this court and the appeal was submitted for our decision on December 10, 1999, following oral argument. Because a denial of a requested refund, we hold today, is a decision as to a charge or exaction and thus protestable, we reverse the judgment of the Court of International Trade dismissing those claims, and in light of the settled case law holding the HMT unconstitutional when applied to exports, remand for a refund calculation on all claims.

BACKGROUND

The Harbor Maintenance Tax, 26 U.S.C. § 4461, was enacted in 1986 as a means of funding maintenance of the nation's ports. The tax was enacted as part of the Water Resources Development Act ("WRDA") and operates by imposing a fee on commercial vessels using the ports. The tax was assessed on importers, exporters, domestic shippers and commercial passenger transport.[3] *See* 26 U.S.C. §§ 4461, 4462 (1994). The revenues from the HMT are used to fund WRDA projects undertaken largely by the Army Corps of Engineers. The Department of Defense is authorized to undertake the maintenance and development projects, through the Secretary of the Army. The HMT portion of the statute is implemented by the Secretary

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[3] The application of the HMT to exports was found unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998). Application of the HMT to commercial passenger transport, however, was held constitutional by this court. *See Carnival Cruise Lines v. United States*, 200 F.3d 1361 (Fed. Cir. 2000). Cases addressing the constitutionality of the HMT as applied to imports are still pending at the time of this decision.

of the Treasury, via the Customs Service. *See* 26 U.S.C. § 4462(i) (1994).

Congress authorized Customs to promulgate regulations and establish appropriate administrative procedures to implement the HMT. 26 U.S.C. § 4462(i). Congress also instructed that the tax should be administered and enforced as if it were a customs duty. 26 U.SC. § 4462(f)(1). Customs created a procedure in which the exporter was liable for the HMT at the time it loaded the cargo, but was not required to pay the HMT until the end of the quarter. 19 C.F.R. § 24.24(e)(2) (1998). Quarterly payments were required to be submitted accompanied by the "Harbor Maintenance Fee Quarterly Summary Report" (Customs Form 349) within 31 days of the end of the quarter. 19 C.F.R. § 24.24(f). Exporters could make supplemental payments or request refunds of overpayments by filing a Harbor Maintenance Fee Amended Quarterly Summary Report (Customs Form 350). *Id.* at § 24.24(e)(5).

Customs Form 350 provided four specific factual or legal reasons for requesting a refund, as well as a fifth general, catch-all provision: "(1) Calculations/ Clerical Error; (2) Duplication of Payment; (3) Misinterpretation of Exemption; (4) Overvaluation of Shipments; (5) Other—Please Specify -." Neither Customs Form 350 nor the refund regulations contain any time limit for making a supplemental payment or requesting a refund of export HMT. *Id.*

Appellant Swisher paid HMT from the fourth quarter of 1990 through the second quarter of 1994. Swisher then sought a refund of all HMT paid, on the sole ground that its exports were exempt from the tax

under Article I, Section 9, Clause 5 of the Constitution.[4] Unlike many other exporters seeking to challenge the constitutionality of the HMT, Swisher sought its refund by filing on September 28, 1994 Amended Quarterly Summary Reports for each quarter that it had paid the HMT. Swisher used the catch-all "other" category and specified "[s]hipments exempt from tax under Article I, Section 9, Clause 5, United States Constitution" as the basis for its refund.

Customs denied Swisher's refund request in a letter dated October 26, 1994. Customs denied the request on the grounds that the HMT was a constitutional fee and alternatively that the request was not timely filed for some of the HMT at issue. The Customs letter in response to Swisher's refund request appeared to treat Swisher's refund request as a "protest" and advised Swisher that it could "file a civil action contesting the denial of this protest under 19 U.S.C. § 1514 in the Court of International Trade."

On November 21, 1994, Customs published a Federal Register notice promulgating procedures for protests concerning the constitutionality of the export HMT. The procedures instructed that protests were to be filed within 90 days of collection by Customs, on Customs Form 19 (the standard Customs protest form), in letter form, or in the form of statements of protest affixed to the Quarterly Summary Report normally used to file HMT payments. *User Fee Protests*, T.D.

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[4] The clause states:

> No Tax or Duty shall be laid on Articles exported from any State.

U.S. Const. Art. I § 9, 5.

94091, 59 Fed.Reg. 60,044 (1994). Instead of filing an action in the Court of International Trade as instructed in the refund denial letter of October 26, Swisher filed, on November 23, 1994, a protest on Customs Form 19, challenging the denial of its refund requests. On February 24, 1995, Swisher requested accelerated disposition of its protest. Accelerated requests are deemed denied as a matter of law if no action has been taken within 30 days of the request for accelerated disposition. *See* 19 U.S.C. § 1515. When, because of the acceleration request, the Swisher protest was denied as a matter of law on March 26, 1995, Swisher filed this action with the Court of International Trade on March 29, 1995. The action was stayed immediately upon filing pending the outcome of *United States v. United States Shoe Corporation*, a previously filed challenge to the export HMT. *See* 907 F. Supp. 408 (Ct. Int'l Trade 1995) (holding that the HMT was unconstitutional when applied to exports), *affirmed United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997), *affirmed United States v. United States Shoe Corp.*, 523 U.S. 360, 118 S. Ct. 1290, 140 L.Ed.2d 453 (1998).

Swisher participated in the *U.S. Shoe* case as an *amicus curiae*, asserting a unique jurisdictional argument, that the denial of an HMT refund request pursuant to the governing regulation, 19 C.F.R. § 24.24(e)(5), is a protestable decision and thus subsection 1581(a) provides the appropriate basis for Court of International Trade jurisdiction. The parties in *U.S. Shoe* asserted slightly different jurisdictional arguments. In *U.S. Shoe*, the government argued that jurisdiction was proper under section 1581(a) because the decision by Customs to accept the HMT was a

protestable decision. The plaintiff in *U.S. Shoe* argued that jurisdiction was proper under subsection 1581(i).

The relevant portions of the jurisdictional statute state:

> (a) The Court of International Trade Shall have exclusive jurisdiction of any civil action *commenced to contest the denial of a protest*, in whole or in part, under section 515 of the Tariff Act of 1930.
>
> . . .
>
> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for–
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581 (1994) (emphasis added).

The statute defines a protestable decision as:

> . . . decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) *all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury*;
>
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
>
> (6) the refusal to pay a claim for drawback; or
>
> (7) the refusal to reliquidate an entry under subsection (c) or (d) of section 1520 of this title;
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section . . .

19 U.S.C. § 1514(a) (emphasis added).

In *U.S. Shoe* the Court of International Trade rejected the government's theory that acceptance of the HMT payment by Customs was a protestable decision. Accordingly, the court held that section 1581(i) was the proper basis for jurisdiction. The court also rejected Swisher's jurisdictional theory in dicta, stating that Customs does not have the power to decide the constitutionality of the HMT and therefore could not issue a protestable decision pursuant to the refund provision of section 24.24(e)(5). *See U.S. Shoe*, 907 F. Supp. 408, 421 (Ct. Int'l Trade 1995).

This court heard *U.S. Shoe* on appeal. *See* 114 F.3d 1564 (Fed. Cir. 1997). While not addressing Swisher's argument directly, the panel did state that section 1581(a) was "not directly applicable" because "it applies to suits commenced to contest the denial of a protest." *U.S. Shoe*, 114 F.3d at 1569. This court then found the HMT unconstitutional when applied to exports. The government appealed the constitutional ruling to the Supreme Court, but did not appeal the jurisdictional holding. Nevertheless, the Supreme Court observed that the "[Court of International Trade] properly entertained jurisdiction in this case" noting that Customs has not issued a decision but "merely passively collect[ed] HMT payment." 523 U.S. at 365, 118 S. Ct. at 1293.

Following the Supreme Court decision in *U.S. Shoe*, the Court of International Trade designated a number of test cases to resolve outstanding HMT issues. *Swisher* was designated a "test case" to resolve the question of whether the denial of a request for refund of the export HMT is a protestable Customs Service decision such that subsequent Court of International Trade jurisdiction is proper under section 1581(a). On

summary judgment, the Court of International Trade held that the denial of a refund request was not a protestable decision and thus jurisdiction was not proper under section 1581(a). That court then held that section 1581(i) residual jurisdiction was proper and the two-year statute of limitations on actions under section 1581(i) was applicable, thus barring Swisher's claims for a refund of all HMT paid prior to October 27, 1992. *See Swisher Int'l, Inc. v. United States*, 27 F. Supp.2d 234. Swisher timely appealed to this court.

This court has jurisdiction over this appeal, as it seeks review of a final decision of the Court of International Trade, pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

On appeal, Swisher asserts that denial of a refund request made pursuant to 19 C.F.R. § 24.24(e)(5) on any ground, including that the "export HMT" is unconstitutional, is a protestable decision. Hence, Swisher argues, because it followed all of the required procedures to protest Customs' denial of the refund request and that protest was denied, the Court of International Trade's jurisdiction rested on 28 U.S.C. § 1581(a).

The Court of International Trade held, and the government argues, that section 1581(a) cannot be the proper basis of jurisdiction because this court has already decided that section 1581(i) is the proper basis of jurisdiction for a lawsuit challenging the constitutionality of the HMT. The crux of the government's argument is that because by its very terms subsection (i) is only applicable when *no* other subsection is

available, if there had been a basis for invoking subsection (a) jurisdiction in export HMT challenges, then the *U.S. Shoe* plaintiff would have been required to do so. As the Supreme Court, like this court, found section 1581(i) jurisdiction proper for the *U.S. Shoe* plaintiff, the government argues, both courts must have determined that subsection (a) jurisdiction was *not* available for constitutional challenges to the export HMT. Finally, the government argues that denial of such a refund request cannot be a protestable decision because such a holding would "eviscerate" the statute of limitations by allowing an exporter to accrue a cause of action at any time it chose simply by filing a request for a refund. The government further argued that since only final decisions of Customs are protestable the denial of a refund request cannot be protestable because the refund request is a voluntary procedure. The Court of International Trade also reasoned that the request for refund was not a mandatory procedure, because this court did not require the *U.S. Shoe* plaintiff to file a refund request. In further support of this argument, the Court of International Trade points again to the open ended time for filing a refund request as evidence that the procedure is not mandatory.

Thus, the principal issue before us is whether, in light of the implications of the decisions in *U.S. Shoe*, the denial of Swisher's refund request can be a protestable decision within the meaning of 19 U.S.C. § 1514(a), thus giving rise to the trial court's jurisdiction under section 1581(a). This is a question of law, and thus is subject to *de novo* review in this court, *see Dehne v. United States*, 970 F.2d 890, 892 (Fed. Cir. 1992), as is the instant grant of summary judgment itself. We address first whether either decision in *U.S. Shoe* precludes our

founding jurisdiction in the trial court on section 1581(a), and second, if not, whether, under 19 U.S.C. § 1514(a), Customs' denial of Swisher's refund request resulted in a protestable decision, a pre-requisite of section 1581(a) jurisdiction.

I.

The Supreme Court's and this court's opinions in *U.S. Shoe* both stated that in that case there was no protestable Customs decision with respect to the constitutionality of the HMT. *See* 523 U.S. at 363-68, 118 S. Ct. at 1293-94 ("protests are not pivotal, for Customs 'performs no active role,' it undertakes no analysis . . . instead merely 'passively collects' HMT payments.") (quoting *U.S. Shoe*, 114 F.3d at 1569). The courts therefore allowed the suits although they were filed in the Court of International Trade without a prior protest. Thus, the government argues, we cannot now find that Swisher accrued a protestable decision simply by filing a refund request, albeit a constitutionally-inspired one. Swisher argues, however, that because the *U.S. Shoe* plaintiff had filed neither a refund request nor a protest of denial of a refund request, the holding in that case is not applicable here, where Swisher did file a refund request and, when it was denied, a protest, which was also denied. We agree with Swisher.

In *U.S. Shoe*, the government argued that Customs' mere *acceptance* of the exporter's payment of the HMT was a "decision" of Customs subject to protest. Because the *U.S. Shoe* plaintiff had not protested the collection, but filed directly in the court below, the government said that suit had no jurisdictional basis. It was only this argument that the Supreme Court, like

our court, rejected in holding that there was no protestable decision and thus no jurisdiction under section 1581(a). Neither our decision nor that of the Supreme Court, however, reached the question of whether section 1581(a) jurisdiction would have been available had a protest been filed and denied following the filing and denial of a refund request. Thus *U.S. Shoe* does not preclude our consideration of section 1581(a) jurisdiction in this case where a refund request and protest were, in turn, filed and denied.

This court has indeed stated that "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under any other subsection of section 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). Nevertheless, the *U.S. Shoe* interpretation of the jurisdictional statute does not control subsequent suits asserting similar challenges but in different procedural postures. Moreover, our holding in *Miller* (and other decisions) is meant merely to prevent a party from asserting residual (subsection (i)) jurisdiction when jurisdiction under another subsection would be appropriate. In *U.S. Shoe*, another basis was not available; here it is.

Swisher pursued its constitutional challenge along a procedural path entirely different from that chosen by the *U.S. Shoe* plaintiff. In addition, it appears that there was much confusion in Customs and among exporters as to the proper procedure for challenging the constitutionality of the HMT as applied to exports. Indeed, Customs had published a Federal Register notice urging that parties file a protest within 90 days

of collection of the tax by Customs to challenge the constitutionality of the export HMT, *see User Fee Protests*, 59 Fed. Reg. 60,044, after some plaintiffs had filed in district court and others, like the *U.S. Shoe* plaintiff, filed first in the Court of International Trade, all without prior refund requests or protests. Thus, at the time, there was not one obvious jurisdictional basis that this court could have required the *U.S. Shoe* plaintiff to use, and the court rejected the jurisdictional basis advocated by Customs in its arguments and in the Federal Register notice.

Our holding in *U.S. Shoe* that there was no protestable decision was limited to the procedural posture of that case. There, the plaintiff indeed did not have a protestable decision that could have given rise to jurisdiction under section 1581(a) because, unlike Swisher, it had not filed a refund request. Thus, there was no Customs decision at all. Having rejected the government's argument that Customs' mere acceptance of the HMT was itself a protestable decision, we thus found jurisdiction in *U.S. Shoe* was appropriate under section 1581(i) because it could not have been proper under any other subsection. Our holding in *U.S. Shoe* thus does not dictate only one possible procedure for challenging the export HMT. Our holding in *U.S. Shoe* was merely that, given the procedural posture of that case, section 1581(i) residual jurisdiction was the appropriate jurisdictional basis. Thus, *U.S. Shoe* does not limit Swisher, or other challengers to the HMT, to section 1581(i) jurisdiction and its attendant two-year statute of limitations.

II.

Having held that Swisher may assert a jurisdictional basis different from that found applicable to the *U.S. Shoe* plaintiff, we must now decide if a protestable decision arose from Customs' denial of Swisher's request for a refund of the HMT.

Swisher's theory of protestability asserts that Customs' denial of its refund request was a decision "as to the amount of duties chargeable" or "as to a charge or exaction . . . within the jurisdiction of the Secretary of the Treasury," as specified in 19 U.S.C. §§ 1514(a)(2) and (3), the statute that provides for protests of final Customs decisions. The government, however, once again attempts to use *U.S. Shoe* to block Swisher, arguing that a request for a refund cannot be a protestable decision because the protest statute only covers final decisions of Customs. The decision on the refund could not be a final decision, the government argues, because the decision in *U.S. Shoe* precludes a finding that a request for refund is a mandatory procedure. The Court of International Trade reasoned, and the government now argues, that non-mandatory procedures cannot result in a final decision, and therefore protestable decision of Customs. We find this argument unpersuasive.

There is nothing in the regulation indicating that the filing of an HMT refund request is voluntary. Nor does the regulation in any way indicate that a taxpayer might proceed directly from payment to filing suit, under the 19 U.S.C. § 1581(i) residual jurisdiction of the Court of International Trade, to seek a refund of the

HMT. Indeed, the regulation merely says that refund requests should be made on Customs Form 350. The regulation does not distinguish among types of refunds that may be requested using the procedure, nor does it direct taxpayers to file, as an alternative, in the Court of International Trade.

Furthermore, the *U.S. Shoe* decision by this court did not directly address whether HMT refund requests pursuant to 19 C.F.R. § 24.24(e)(5) were voluntary. The *U.S. Shoe* plaintiff had not filed a refund request and neither party in that case argued that a refund request should have been filed. The *U.S. Shoe* decision merely held that collection of the HMT is not a protestable Customs decision. In addition, the Court of International Trade decision in *U.S. Shoe* mentioned in dicta that Customs decisions as to the administration of the tax (but not its constitutionality) were protestable decisions. *See U.S. Shoe*, 907 F. Supp. at 421. Thus, neither of those decisions supports the argument now forwarded by the government that denial of any refund requests is not a protestable decision.

In addition to requiring a tortured reading of our case law and the Customs regulation, the government's proposed interpretation would, in effect, require any HMT taxpayer who discovered an error entitling it to a refund to file a suit with the Court of International Trade within two years of collection of the HMT or risk losing the refund. Whether such a taxpayer had filed the "voluntary" refund request would be irrelevant to the statute of limitations. Any taxpayer following the instructions in the regulation and first filing a refund request would risk losing its cause of action if the processing of the refund request took more than two

years. The government's argument that the protest procedures are voluntary would render the refund portion of the regulation superfluous. We are not willing to make such an interpretation of the HMT regulations. In any event, as discussed *infra*, binding precedent of our predecessor court holds that denial of a request for a refund of deposited duties on imports is a protestable decision. *See Eurasia Import v. United States*, 31 C.C.P.A. 202, 211-12 (1944). We see no reason to treat the HMT refund requests as a "voluntary procedure" merely because the HMT is imposed, in this case, on exports.[5]

In addition, the government asserts that the protest statute only covers decisions "as to a charge or exaction." The denial of a refund request, the government asserts, is not a decision as to a charge or exaction. Further, the government argues, if the statute was intended to apply to *refusals* to grant refunds on charges or exactions, it would explicitly say as much, for the statute does explicitly state that "refusals to pay a claim for drawback" and "refusals to reliquidate an entry" are protestable decisions. *See* 19 U.S.C. § 1514(a)(6) & (7). Thus, the government argues, while the decision to *accept* that payment might have been considered a "decision as to a charge or extraction" [*sic*] before *U.S. Shoe*, the decision to *deny a refund* of such charge or exaction may not. The government then argues—again using *U.S. Shoe*—that the decisions in *U.S. Shoe* preclude a finding that Customs' mere

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[5] The Court of International Trade has held that payment of the HMT on imports merges into liquidation and thus is a protestable decision. *See Thomson Consumer Elec. Inc. v. United States*, 62 F. Supp. 2d 1182 (Ct. Int'l Trade 1999).

acceptance of the tax payments is a protestable decision. We cannot agree with such an interpretation of the statute and our case law.

We are given no reason to strain to exclude a decision as to a refund of a charge or exaction from the definition of a "decision as to a charge or exaction." Indeed a precedential decision by our predecessor court, the Court of Customs and Patent Appeals, explicitly holds that the denial of a request for a refund is indeed a protestable decision. *See Eurasia Import*, 31 C.C.P.A. at 211-12. Addressing whether an earlier version of 19 U.S.C. § 1514(a)[6] authorized a protest of a refund denial, that court held:

> There is, of course, no express provision authorizing a protest against the collector's refusal to refund excessive duties . . . such as is provided, for example, in the case of the collector's refusal "to pay any claim for drawback." That it is the duty of the collector to make such refunds, however, is so well understood that no citation of statutory provisions concerning it and judicial decisions based thereon is necessary. . . . It seems to us that *a refusal to make refund of excessive duties is a negative decision, or finding which amounts to an exaction quite as much as a refusal to pay a claim* for drawback and we see no reason why section 514 . . . should be so narrowly construed with respect to the jurisdiction of the courts . . . as to deprive them of jurisdiction of a protest against such refund.

Id. at 211-12 (emphasis added).

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[6] The relevant language of section 514 of the Tariff Act of 1930 and 19 U.S.C. § 1514(a) is virtually identical.

Furthermore, the case law relied on by the government is neither apposite nor binding on this court. The government cites *Alberta Gas Chemicals, Inc . v. Blumenthal*, 82 Cust. Ct. 77, 467 F. Supp. 1245, 1249-50 (Cust. Ct. 1979), and a case quoting it, as holding that a charge or exaction is limited to "actual assessments of specific sums of money." But this is mere dicta. In *Alberta Gas*, the court was addressing an argument that an agency decision to begin an anti-dumping investigation was a decision as to a charge or exaction. Viewed in that context, we do not read the Customs Court's statement to exclude a decision about a requested refund from the sphere of "actual assessments of specific sums of money." In any event, unlike decisions of our predecessor courts, decisions of the predecessor to the Court of International Trade, a trial court, do not bind us. To the extent *Alberta Gas* can be construed as the government suggests, we reject it.

In further support of its holding that the denial of Swisher's refund request was not a protestable decision, the Court of International Trade said that it would be "incongruous" to allow a plaintiff to convert the "no decision" of HMT payment acceptance into a protestable decision merely by filing a refund request. Likewise, the government argues that Swisher's theory "eviscerates any statute of limitations" by allowing the plaintiff to control both the existence of a protestable decision and the timing of the decision. The Court of International Trade opinion cites our decision in *United States v. Cocoa Berkau, Inc.*, which declares that a court cannot interpret the accrual of a right of action in such a way that it "permits a single party to postpone unilaterally and indefinitely the running of the statute of limitations." 990 F.2d 610, 614 (Fed. Cir.

1993) (quotations omitted). Swisher responds that the governing HMT regulation has no time limit on requests for refunds or corrections of underpayments or overpayments based on clerical errors or other mistakes in calculating the HMT owed. Thus, Swisher argues, a regulatory failure to impose a period of limitations on refund requests should not preclude a finding that denial of a request for a refund is a protestable decision.

While we agree with the principle of *Cocoa Berkau* that courts should be cautious not to deprive one party of the repose intended by a statute of limitations by allowing another party to accrue a cause of action at will, that is not the situation in this case. Swisher did not sleep on its constitutional claims only to file the refund requests after a long delay. Rather, Swisher promptly filed its request for a refund in 1994, at the same time that many other exporters began to question the constitutionality of the HMT as it applied to exports. Thus, the filing by Swisher in 1994 for refund of payments going back to 1990 is comparable to that of an exporter who discovered four years after the fact that it had overpaid its HMT because of a calculation error.

By leaving the time for filing refund requests open, the regulation seems to contemplate that an HMT taxpayer might discover overpayments and request refunds of those overpayments many years after the payments were made. Likewise, the regulation appears to allows Customs to audit all of a taxpayer's HMT payments anytime within five years of calculation of the

payment. *See* 19 C.F.R. § 24.24(g)(1999).[7] Indeed, in a case recently before this court, *Princess Cruises v. United States*, 201 F.3d 1352 (Fed. Cir. 2000), in 1991 Customs began an audit of the cruise line's HMT payments dating back to 1987. Thus, neither the government nor the taxpayer is barred by a two-year statute of limitations from initiating actions involving adjustments to HMT payments. Allowing a taxpayer a similar amount of time to seek a refund of a tax, on the ground that rather than miscalculated, it is altogether unlawful, is not, in our view, "incongruous." That Customs, by intent or in error, promulgated a regulation that does not provide a time limit for filing refund requests does not warrant our creating a limitation period by the expedient of deeming refund requests not protestable. Analogous procedures for refund of import duties have statutorily imposed time limits; however, there does not appear to be a generic limitation period on requesting refunds generally.[8] Customs was free to

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[7] The regulation requires that HMT taxpayers maintain all documents for Customs inspection for five years from the time of calculation. 19 C.F.R. § 24.24(g). The regulation, however, does not explicitly prohibit the government from auditing HMT payments after five years.

[8] In fact, it is not at all clear that refunds on import duties, which comprise the vast majority of the money collected by Customs, would or could be requested outside of the bounds of the liquidation or reliquidation procedures. With regard to imports, most fees, including the HMT, are collected at liquidation. Any fee collected at liquidation is considered merged with the liquidation. *See Thomson Consumer Elec., Inc. v. United States*, 62 F. Supp. 2d 1182 (Ct. Int'l Trade 1999). A legal challenge to a liquidation decision must be made as a protest within 90 days of liquidation. *See Mattel Inc. v. United States*, 72 Cust. Ct. 257, 377 F. Supp. 955, 960 (Cust. Ct. 1974); 19 U.S.C. § 1514(c)(3)(A). A challenge based on a clerical error, or other factual mistake must be raised within

impose time limits on the filing of HMT refund requests just as the statutes impose time limits on reliquidation requests, and it remains free to alter the regulation to impose a time limit in the future. This court, however, will not impose a time limit on refund requests by holding, without basis, that such requests are not protestable.

Allowing exporters to seek refunds of all HMT paid since 1987 also avoids a fundamental unfairness to those exporters who did not have the resources to mount test litigation in the district court or the Court of International Trade on the constitutionality of the export HMT. In contrast, if we were to hold that a request for refund was not a protestable decision, Swisher, and others, would be limited to recovering only that HMT paid within two years before filing suit in the Court of International Trade. Given that the constitutionality of the HMT was not seriously questioned until 1994 and not completely resolved until 1998, such a holding would bar recovery of much of the unconstitutional HMT paid by exporters between 1987 and 1998. Indeed, some exporters with limited legal resources might be completely barred from recovering their payments of the unconstitutional tax. Erroneous overpayments during the same period due to miscalculations, however, would be recoverable even if the miscalculation was not discovered until today. We decline to create such an anomalous situation, although the government so urges. Finding no reason to believe that a request for refund, based on a clerical error, is

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one year of liquidation in a request of reliquidation. *See* 19 U.S.C. § 1520(c). Denial of a request for reliquidation under section 1520(c) is a protestable decision. *See* 19 U.S.C. § 1514(a)(7).

not a protestable decision (and thus not time barred after two years from collection), we see no reason to treat differently requests based on constitutional error.

Accordingly, we hold that the denial of a request for refund is a protestable decision and thus can accrue a claim based on the alleged illegality of the exaction of the HMT even if the request, which under the HMT regulation can be filed at any time, is made after the two-year statute of limitations has run on suing over the act of payment of the tax. Hence, Swisher's cause of action accrues at the time of the denial of the protest following the denial of the refund request, and the 180-day period of limitations for filing with the Court of International Trade runs only from that date.[9]

CONCLUSION

The summary judgment of the Court of International Trade dismissing Swisher's refund claims is therefore

REVERSED and the case is REMANDED.

COSTS

Each party to pay its own costs.

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[9] Suits filed following the denial of a protest must be filed with the Court of International Trade within 180 days after the denial of the protest. 19 C.F.R. § 174.31 (1999). Swisher's protest was denied as a matter of law on March 26, 1995 and as it filed suit in the Court of International Trade on March 29, 1995, its suit was timely filed.

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

Slip Op. 98-153
Court No. 95-03-00322

SWISHER INTERNATIONAL, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

[Nov. 6, 1998]

OPINION

RESTANI, Judge:

This action seeking recovery of Harbor Maintenance Taxes (HMT) pursuant to 28 U.S.C. § 1581(a) (1994) (jurisdiction over denial of protest by Customs Service) is before the court on cross motions for summary judgment.

Facts

Swisher International, Inc. paid HMT on a quarterly basis from the fourth quarter of 1990 through the second quarter of 1994. Swisher filed refund requests on Customs Form 350 on the basis that the statute

imposing HMT on exports is unconstitutional. The refund requests were denied on October 26, 1994. On November 21, 1994 Customs promulgated specific procedures for filing protests challenging the constitutionality of HMT on exports. *See User Fee Protests*, 59 Fed. Reg. 60044 (Dep't Treasury 1994). On November 23, 1994 Swisher protested the denial in the manner instructed by Customs. Swisher requested an accelerated disposition of the protest under 19 U.S.C. § 1515(b) (1994) on February 24, 1995. Swisher then filed this action on March 29, 1995, which was three days after the protest would have been denied by operation of law, *see* 19 U.S.C. § 1515(b), if the protest had been one of the protestable decisions listed in 19 U.S.C. § 1514(a) (1994).

The HMT statute was declared unconstitutional as applied to foreign exports, as are at issue here. *U.S. v. U.S. Shoe Corp.*, 523 U.S. 360, 118 S. Ct. 1290, 140 L. Ed.2d 453 (1998). In *U.S. Shoe*, the Supreme Court found that jurisdiction lay under 28 U.S.C. § 1581(i) (1994).[1] *Id.* at 1293-94. The applicable statute of

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[1] Section 1581(i) of Title 28 provides in relevant part:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for-
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

limitation is 28 U.S.C. § 2636(i) (1994),[2] which permits suit to be commenced within two years of payment of the tax. *See Stone Container Corp. v. United States*, Slip Op. 98-143, No. 96-10-02366, 1998 WL 800017 (Ct. Int'l Trade Oct. 5, 1998). Thus, some of plaintiff's claims will be timed barred unless jurisdiction is also cognizable under 28 U.S.C. § 1581(a).

Swisher participated as an *amicus curiae* before both this court and the Court of Appeals for the Federal Circuit, raising its refund protest denial theory, but as it was not a party it could not obtain a definitive disposition of its theory.[3] The court addresses it now.

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(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

[2] Section 2636 of Title 28 provides in relevant part:

Time for commencement of action

* * *

(i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)-(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

[3] *See U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1570 (Fed. Cir. 1997) (finding jurisdiction under 28 U.S.C. § 1581(i), and not § 1581(a), and leaving open issue of whether a protest U.S. Shoe might have filed would have altered this finding).

Discussion

The Supreme Court recognized jurisdiction over suits to recover HMT on exports as lying under 28 U.S.C. § 1581(i), the residual jurisdiction of the court. *U.S. Shoe*, 118 S.Ct. at 1293-94. Section 1581(i) applies if none of the other sections of 28 U.S.C. § 1581 are available for relief. *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied* 484 U.S. 1041, 108 S. Ct. 773, 98 L.Ed.2d 859 (1988) (citing cases). This means that if one had the opportunity for access to the court under 28 U.S.C. § 1581(a),[4] albeit after exhausting mandatory administrative remedies, there is no § 1581(i) jurisdiction. *Lowa, Ltd. v. United States*, 5 CIT 81, 88, 561 F. Supp. 441, 446-47 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984).

Of course, it is possible that there is an exception to the long line of case law on this point because of the uniqueness of a suit based on exports, as opposed to imports, the normal subject matter of the court. The court finds this not to be the case. In fact, it is this uniqueness which reinforces the applicability of the standard jurisprudence. Section 1581(i) provides jurisdiction because recovery of HMT on the basis of the statute's unconstitutionality cannot be shoe-horned into Customs' protest procedures. What may be protested is a decision of Customs falling within the categories set

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[4] Section 1581(a) of Title 28 provides:

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

forth in 19 U.S.C. § 1514(a).[5] Swisher alleges that Customs' "decision" to deny its refund request was a

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[5] Section 1514(a) of Title 19 provides in relevant part:

(a) Finality of decisions; return of papers

Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;

(5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;

(6) the refusal to pay a claim for drawback; or

(7) the refusal to reliquidate an entry under section 1520(c) of this title;

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed in section 2636 of that title.

decision regarding the "amount of duties chargeable" or a "charge or exaction."

First, and most importantly, *U.S. Shoe*, 118 S. Ct. at 1293-94, makes clear that there is no protestable Customs decision with respect to the constitutionality of HMT. It would be incongruous to permit conversion of "no decision" into a protestable decision, by means of the unilateral choice of the exporter to seek a refund at any time of its choosing. There are no time limits for the request or for the Customs decision thereon under 19 C.F.R. § 24.24(e)(5) (1997), which provides for HMT refund requests. Interpretation of the law to put control of the setting of limitations periods in the hands of one party to the dispute is disfavored. *United States v. Cocoa Berkau Inc.*, 990 F.2d 610, 614 (Fed. Cir. 1993) ("we cannot 'permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations'.") (quoting *United States v. Commodities Export Co.*, 972 F.2d 1266, 1271 (Fed. Cir. 1992)).

Second, it is clear that no liquidation is involved. At most, plaintiff analogizes the denial of the refund request to a liquidation, but it is not a liquidation as that term is understood—the final determination of import duties. *See* 19 C.F.R. § 159.1 (1998) ("liquidation means the final computation or ascertainment of the duties or drawback accruing on an entry."). It is a liquidation which settles "the amount of duties owing." It is also "charges or exactions" that merge into liquidation which are protestable. *United States v. Utex International, Inc.*, 857 F.2d 1408, 1414 (Fed. Cir. 1988) ("[19 U.S.C. § 1514 and 28 U.S.C. § 2637] relate to the exhaustion of administrative remedies with respect to liquidation of the entry, as a prerequisite to judicial

review of any of the items subsumed in liquidation."). *See also United States v. Ataka America, Inc.*, 17 CIT 598, 606, 826 F. Supp. 495, 502 (1993) (customs action merging into liquidation, "must be protested to avoid finality"). *Utex* and *Ataka* are fully consistent with the traditional definition of charge or exactions as "specific sums of money (other than ordinary customs duties) on *imported* merchandise." *Alberta Gas Chemicals, Inc. v. Blumenthal*, 82 Cust. Ct. 77, 82, 467 F. Supp. 1245, 1249-50 (1979) (emphasis added). *Utex* and *Ataka* are also reconcilable with *Norfolk & Western Railway v. United States*, 18 CIT 55, 843 F. Supp. 728 (1994), *aff'd*, 62 F.3d 1395 (Fed. Cir. 1995) (user fee on vehicles and vessels protestable), as the fees in *Norfolk* were intimately connected to importation. *General Motors Corp. v. United States*, 10 CIT 569, 643 F. Supp. 1139 (1986) is similar and protestability was a more central issue in that case. *See also Carlingswitch, Inc. v. United States*, 68 C.C.P.A. 49, 55, 651 F.2d 768, 773 (1981) ("refusals to refund money" are not 19 U.S.C. § 1514 "charges or exactions.") Thus, it appears there is nothing which may be protested as a prerequisite to 28 U.S.C. § 1581(a) jurisdiction in this case.

Further, while Customs may provide refund and "protest" procedures for the convenience of the parties, if such administrative procedures are not mandatory, they will not toll the statute of limitations. *See Cocoa Berkau*, 990 F.2d at 615-16 (28 U.S.C. § 2415(a) not tolled by permissive administrative proceeding); *Ataka America, Inc.*, 17 CIT at 605, 826 F. Supp. 495, 501-02 (same). Because administrative procedures have been found not to be mandatory as to challenges to the unconstitutionality of HMT on exports, *see U.S. Shoe*, 118 S.Ct. at 1293, they do not toll the statute. As indicated

in the discussion of liquidation, *supra*, even as to questions of interpretation of the HMT statute itself or with regard to factual questions as to HMT on exports, 28 U.S.C. § 1581(a) protest denial jurisdiction is in doubt.

Plaintiff, however, relies heavily on Customs' alleged authority to issue protestable refund decisions under 19 C.F.R. § 24.24(e)(5) (1997), and to case law finding protest necessary for the full array of legal issues arising out of a refund denial.[6] While Customs may have the authority to make decisions with regard to HMT amount, as opposed to the constitutionality of the statute, as indicated it is not at all clear that the mandatory protest procedures of 19 U.S.C. § 1514(a) apply to even such limited decisions, where exports are involved. It may be that for such cases 28 U.S.C. § 1581(i) is the applicable jurisdictional provision. The remedy under 19 C.F.R. § 24.24(e)(5) may be read as the type of remedy which should be exhausted if Customs may make a meaningful, that is, non-futile decision. *See* 28 U.S.C. § 2637(d) (1994) (court has discretion to require exhaustion in various cases including those brought under 28 U.S.C. § 1581(i)). It may be, however, that there is no regulatory time limit pre-

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[6] The court does not take issue with the proposition that protests of 19 U.S.C. § 1514(a) decisions as to imports may raise constitutional issues. *See C.J. Tower & Sons of Buffalo, Inc. v. United States*, 34 Cust. Ct. 95, 34 Cust. Ct. 95, 135 F. Supp. 874 (1955) (reviewing protest involving Fifth Amendment challenge to tariff); *Star-Kist Foods, Inc. v. United States*, 47 C.C.P.A. 52, 275 F.2d 472 (1959) (reviewing protest allegation that duty arose under unconstitutional statute). Nonetheless, *U.S. Shoe* made clear that this procedure is not mandated as to constitutional challenges to HMT on *exports*.

cisely because the time limit is necessarily dictated by the statute of limitation applicable to 28 U.S.C. § 1581(i). In such a case the statute would continue to run until suit is filed. Thus, if a party which paid HMT on exports seeks a refund because of an ordinary dispute within Customs' jurisdiction, it should promptly request one from Customs. It has not been determined, however, that such a request will toll the statute.[7]

Defendant opined at oral argument that the refunds referred to in 19 C.F.R. § 24.24(e)(5) are those described in 19 U.S.C. § 1520(c) (1994) and that refunds under that provision may be made for errors of fact only. Generally, Customs makes refunds of monies erroneously collected pursuant to 19 U.S.C. § 1520. Section 1520(c), which allows correction within one year of liquidation, is limited to factual error, but not all of 19 U.S.C. § 1520(a) is so limited. Subsections 1520(a)(1) and (a)(2) of Title 19 are potentially applicable.[8] Subsection (1), however, refers to liquidation of entries and subsection (2) refers to fees, charges, or exactions, but

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[7] *Dicta* in *U.S. Shoe*, 19 CIT 1284, 1296, 907 F. Supp. 408, 418 (1995), *aff'd*, 114 F.3d 1564 (Fed.Cir.1997), *aff'd*, 523 U.S. 360, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998), might be read to state that such limited decisions as to exports are protestable in the sense of 19 U.S.C. § 1514 and that jurisdiction would lie under 28 U.S.C. § 1581(a) for such decisions. That precise issue was not before the court. The concurring opinion indicates that the lack of time limits for decision making by Customs on refund requests under 19 C.F.R. § 24.24(e)(5) supports the view that this is not a mandatory procedure for purposes of 19 U.S.C. § 1514(a) and, thus, 28 U.S.C. § 1581(a) jurisdiction is lacking. *U.S. Shoe*, 19 CIT at 1302, 907 F. Supp. at 423 (Musgrave, J., concurring).

[8] The other subsections of 19 U.S.C. § 1520(a) cover fines and penalties, (a)(3), and clerical errors, (a)(4).

excludes taxes. Thus, it appears that 19 U.S.C. § 1520 does not apply to export tax refunds.[9] Even if 19 U.S.C. § 1520(a) could be read to apply to export taxes in some circumstances, it cannot be read to allow Customs to refund taxes owed under the terms of a statute, as these taxes were owed at the time the refund was requested. Customs could not refund the taxes because Customs could not declare the statute unconstitutional. Any refund procedures arguably permissible under 19 U.S.C. § 1520 did not apply to these attempts to recover HMT payments. Thus, assuming *arguendo* that decisions as to HMT on exports may be protestable decisions as to "amount of duties," "charges" or "exactions," and thus 28 U.S.C. § 1581(a) protest denial jurisdiction might be applicable in some HMT export situations, it is not applicable to this dispute over the constitutionality of the HMT statute.

In conclusion, the court finds whether or not some decisions with regard to HMT on exports are protestable within the meaning of 19 U.S.C. § 1514(a), there was no protestable decision giving rise to 28 U.S.C. § 1581(a) jurisdiction in this case. Furthermore, a plaintiff cannot unilaterally grant itself a new limitations period by making a refund request whenever it so chooses.

Plaintiff shall present an appropriate judgment sheet reflecting this opinion within twenty days hereof.

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[9] Plaintiff agrees that 19 U.S.C. § 1520 does not apply, but rather argues that 19 C.F.R. § 24.24(e) provides all the refund authority needed. As explained *supra* in the text, the regulatory provision is insufficient to form a basis for jurisdiction in this action.